

INDEX

| | page |
|---|---------|
| Complaint, filed November 16, 1962 | 2 |
| Motion of defendant Ethel Mae Yazell for summary judgment, filed December 10, 1962. | 11 |
| Defendants' answer, filed December 10, 1962. | 15 |
| Response and affidavit in opposition to motion for summary judgment, filed January 17, 1963. | 19 |
| Plaintiff's motion for judgment on the pleadings and for summary judgment, filed January 17, 1963. | 22 |
| Motion for a more definite statement, filed January 17, 1963. | 42 |
| Orders and notices of hearing on motion for summary judgment, filed, respectively, January 17, 1963. | 44 & 45 |
| Reply of Ethel Mae Yazell to plaintiff's opposition, filed January 28, 1963. | 46 |
| Defendants' opposition to plaintiff's motion for judgment and/or summary judgment, filed January 28, 1963. | 49 |
| Defendants' first amended answer, filed February 6, 1963. | 57 |
| Order on motion for summary judgment, filed February 7, 1963. | 63 |

INDEX (Cont'd.)

| | page |
|---|------|
| Motion to strike Par. IV of amended answer, and for judgment on pleadings and for summary judgment, filed April 6, 1963. | 65 |
| Order granting motion for summary judgment of Ethel Mae Yazell, filed August 6, 1963. | 71 |
| Order on plaintiff's motion to strike Par. IV, filed August 12, 1963. | 73 |
| Summary judgment, filed August 15, 1963 | 75 |
| Exhibit "A" — Note | 3 |
| Exhibit "A" — Chattel Mortgage | 25 |
| Exhibit "B" | 37 |
| Designation | 77 |
| Certificate of Service | 79 |

United States Court of Appeals

FOR THE FIFTH CIRCUIT

| | Original | Print |
|--|----------|-------|
| Proceedings in the United States Court of Appeals for the Fifth Circuit..... | 80 | 81 |
| Minute entry of argument and submission (omitted in printing)..... | 80 | 81 |
| Opinion, Hutcheson, J..... | 81 | 81 |
| Dissenting opinion, Prettyman, J..... | 83 | 83 |
| Judgment..... | 86 | 84 |
| Clerk's certificate (omitted in printing)..... | 87 | 85 |
| Order allowing certiorari..... | 88 | 85 |

Section 10, Chapter 10, of the General Statutes of the State of New York, relating to the duties of the Board of Regents of the University of the State of New York, is amended to read as follows:

Section 10. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 11. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 12. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 13. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 14. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 15. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 16. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 17. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 18. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 19. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Section 20. The Board of Regents of the University of the State of New York shall have the honor to receive and to read the reports of the several officers and boards of the University, and to make such recommendations as they may deem proper to the Governor of the State.

Enacted at the City of New York, this 10th day of January, 1900.

John A. Dix, Governor.

John A. Dix, Governor.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 21154

UNITED STATES OF AMERICA,

Appellant,

versus

**DELBERT L. YAZELL'S LITTLE AGES,
DELBERT L. YAZELL, d/b/a YAZELL'S LITTLE
AGES, and ETHEL MAE YAZELL,**

Appellees.

**Appeal from the United States District Court
Western District of Texas.**

RECORD ON APPEAL

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---------------------------|---|---------------|
| UNITED STATES OF AMERICA |) | |
| Plaintiff |) | |
| v. |) | CIVIL ACTION |
| Delbert L. Yazell, d/b/a |) | FILE NO. 1319 |
| YAZELL'S LITTLE AGES, and |) | |
| Ethel Mae Yazell |) | COMPLAINT |
| Defendant |) | |

TO THE HONORABLE COURT:

The UNITED STATES OF AMERICA, hereinafter referred to as Plaintiff, complains of Delbert L. Yazell, d/b/a YAZELL'S LITTLE AGES, and Ethel Mae Yazell, hereinafter referred to as Defendants, and would show the court:

1. This is an action brought by the UNITED STATES OF AMERICA for and on behalf of the Small Business Administration, an agency and instrumentality of the United States. The Court has jurisdiction of this action under the provisions of Section 634 (b), Title 15, and Section 1345, Title 28, United States Code.

2. Defendants are residents of Lampasas County, Texas within the Western District of Texas, Austin Division.

3. On or about July 10, 1957, Defendants executed and delivered to Plaintiff a promissory note, a true copy of which is attached hereto, marked "Exhibit A", and made a part hereof.

4. There is due and unpaid on said note a principal balance in the sum of \$4,719.66 with interest at the rate of 3 percent per annum from August 27, 1962 until paid.

WHEREFORE, Plaintiff demands judgment against Defendants for the sum of \$4,719.66 with interest thereon at the rate of 3 percent per annum from August 27, 1962 until paid and for such other relief to which Plaintiff may be entitled including costs.

UNITED STATES OF AMERICA

/s/ By Ernest Morgan

ERNEST MORGAN, United States Attorney
Western District of Texas

P. O. Box 1701, San Antonio 6, Texas

"EXHIBIT A"

NOTE

Lampasas, Texas

July 10, 1957

\$12,000.000

For value received, the undersigned promises to pay to the order of Small Business Administration, at the Office of Small Business Administration, in the city of Dallas, State of Texas or, at Payee's option, at such other place as may be designated from time to time by the Payee, TWELVE THOUSAND AND NO/100 (\$12,000.00) dollars, with interest on unpaid principal computed from the date of each advance to the undersigned at the rate of three percent per annum, payment to be made in installments as follows: Principal and interest being payable in monthly installments of ONE HUNDRED TWENTY AND NO/100 DOLLARS (\$120.-

00), each, including interest, one on the 10th day of each month hereafter, commencing on the 10th day of November, 1957, and continuing until the principal and interest are fully paid, except that the final payment of principal and interest, if not sooner paid, shall be due and payable on the 10th day of June, 1967.

Payment of any installment of principal or interest owing on this Note may be made prior to the maturity date thereof without penalty.

The term "indebtedness" as used herein shall mean the indebtedness evidenced by this Note, including principal, interest, and expenses, whether contingent, now due or hereafter to become due and whether heretofore or contemporaneously herewith or hereafter contracted. The term "Collateral" as used in this Note shall mean any funds, guaranties, or other property or rights therein of any nature whatsoever or the proceeds thereof which may have been, are, or hereafter may be, hypothecated, directly or indirectly by the undersigned or others, in connection with, or as security for, the Indebtedness or any part thereof. The Collateral, and each part thereof, shall secure the indebtedness and each part thereof. The covenants and conditions set forth or referred to in any and all instruments of hypothecation constituting the Collateral are hereby incorporated in this Note as covenants and conditions of the undersigned with the same force and effect as though such covenants and conditions were fully set forth herein.

The indebtedness shall immediately become due and payable, without notice or demand, upon the appointment of a receiver or liquidator, whether voluntary or in-

voluntary, for the undersigned or for any of its property, or upon the filing of a petition by or against the undersigned under the provisions of any State insolvency law or under the provisions of the Bankruptcy Act of 1898, as amended, or upon the making by the undersigned of an assignment for the benefit of its creditors. Payee is authorized to declare all or any part of the Indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the Indebtedness when due; (2) nonperformance by the undersigned of any agreement with, or any condition imposed by, Payee with respect to the indebtedness; (3) Payee's discovery of the undersigned's failure in any application of the undersigned to Payee or to disclose any fact deemed by Payee to be material or of the making therein or in any of the said agreements, or in any affidavit or other documents submitted in connection with said application or the indebtedness, of any misrepresentation by, on behalf of, or for the benefit of the undersigned; (4) the reorganization (other than a reorganization pursuant to any of the provisions of the Bankruptcy Act of 1898, as amended) or merger or consolidation of the undersigned (or the making of any agreement therefor) without the prior written consent of Payee; (5) the undersigned's failure duly to account, to Payee's satisfaction, at such time or times as Payee may require, for any of the Collateral, or proceeds thereof, coming into the control of the undersigned; or (6) the institution of any suit affecting the undersigned deemed by Payee to affect adversely its interest hereunder in the Collateral or otherwise. Payee's failure to exercise its rights under this paragraph shall not constitute a waiver thereof.

Upon the nonpayment of the Indebtedness, or any part thereof, when due, whether by acceleration or otherwise, Payee is empowered to sell, assign, and deliver the whole or any part of the Collateral at public or private sale, without demand, advertisement or notice of the time or place of sale or of any adjournment thereof, which are hereby expressly waived. After deducting all expenses incidental to or arising from such sale or sales, Payee may apply the residue of the proceeds thereof to the payment of the Indebtedness, as it shall deem proper, returning the excess, if any, to the undersigned. The undersigned hereby waives to the full extent permitted by law all right of redemption or appraisement whether before or after sale. At any such sale payee may become the purchaser of the whole or any part of the Collateral free from any right of redemption so far as permitted by law. Without limiting or affecting such power of sale, Payee is further empowered, upon the nonpayment of the Indebtedness, or any part thereof, when due, to collect or cause to be collected or otherwise to be converted into money all or any part of the Collateral, in the name of Payee or the undersigned or otherwise, by suit or otherwise, and to surrender, compromise, release, renew, extend, exchange, or substitute any item of the Collateral in transactions with the undersigned or any third party, irrespective of any assignment thereof by the undersigned, and without prior notice to or consent of the undersigned or any assignee. Whenever any item of the Collateral shall not be paid when due, or otherwise shall be in default, whether or not the indebtedness, or any part thereof, has become due, Payee shall have the same rights and powers with respect to such item of the Collateral as are granted in respect thereof in this para-

graph in case of nonpayment of the Indebtedness, or any part thereof, when due. None of the rights, remedies, privileges, or powers of Payee expressly provided for herein shall be exclusive, but each of them shall be cumulative with and in addition to every other right, remedy, privilege, and power now or hereafter existing in favor of Payee, whether at law in equity, by statute or otherwise.

The undersigned agrees to take all necessary steps to administer, supervise, preserve, and protect the Collateral; and regardless of any action taken by Payee, there shall be no duty upon Payee in this respect. The undersigned shall pay all expenses of any nature, whether incurred in or out of Court, and whether incurred before or after this note shall become due at its maturity date or otherwise, including but not limited to reasonable attorney's fees and costs, which Payee may deem necessary or proper in connection with the satisfaction of the Indebtedness or the administration, supervision, preservation, protection (including, but not limited to, the maintenance of adequate insurance) of or the realization upon the Collateral. Payee is authorized to pay at any time and from time to time any or all of such expenses, add the amount of such payment to the amount of the Indebtedness and charge interest thereon at the rate specified herein with respect to the principal amount of this Note.

The security rights of Payee and its assigns hereunder shall not be impaired by Payee's sale, hypothecation or rehypothecation of any note of the undersigned or any item of the Collateral, or by any indulgence, including but not limited to (a) any renewal, extension, or modification which Payee may grant with respect to the Indebtedness or any part thereof, or (b) any surrender,

compromise, release, renewal, extension exchange, or substitution which Payee may grant in respect of the Collateral, or (c) any indulgence granted in respect of any endorser, guarantor, or surety. The purchaser, assignee, transferee, or pledgee of this Note, the Collateral, any guaranty, and any other document (or any of them), sold, assigned, transferred, pledged or repledged, shall forthwith become vested with and entitled to exercise all the powers and rights given by this Note and all applications of the undersigned to Payee, as if said purchaser, assignee, transferee, or pledgee were originally named as Payee in this Note and in said application or applications.

/s/ Delbert L. Yazell
(Delbert L. Yazell)

/s/ Ethel Mae Yazell
d/b/a Yazell's Little Ages

Note. — Corporate applicants must execute Note, in corporate name, by duly authorized officer, and seal must be affixed and duly attested; partnership applicants must execute note in firm name, together with signature of a general partner.

MODIFICATION OF PROMISSORY NOTE

Re: DL 283,016-LAM-DAL
Delbert L. Yazell, d/b/a
Yazell's Little Ages
412 South Live Oak Street
Lampasas, Texas

WHEREAS, heretofore and under date of July 10, 1957, Delbert L and Ethel Mae Yazell, d/b/a Yazell's Little Ages (hereinafter called "Borrower"), made, executed and delivered to the Small Business Administration, their promissory note, in the original principal amount of \$12,000., payable in monthly installments of \$120. each, including interest at the rate of 3 percent per annum, final maturity date of said note being June 10, 1967, and,

WHEREAS, it is mutually desirable, beneficial and agreeable to the parties hereto that the repayment terms of said note be modified so as to provide for the maturity date as set out in Loan Authorization.

NOW, THEREFORE, in consideration of the mutual benefits inuring to each other, it is understood and agreed, by and between the parties hereto, that the terms and conditions of Borrower's Note, as above described, are hereby modified as follows:

All principal and interest not sooner paid shall become due and payable 10 years from date of note.

It is further understood and agreed that all other terms, conditions and covenants of the aforesaid Note, not otherwise modified hereby, shall be and remain the same, and that this Agreement, when executed by the parties here-

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN, TEXAS

UNITED STATES OF AMERICA)

Plaintiff)

VS.)

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and) FILE NO. 1319

ETHEL MAE YAZELL)

Defendant)

**MOTION OF DEFENDANT ETHEL MAE YAZELL
FOR SUMMARY JUDGMENT**

TO SAID HONORABLE COURT:

Now comes Ethel Mae Yazell, one of the defendants herein, and moves the Court for summary judgment in favor of this defendant Ethel Mae Yazell on all of the plaintiff's claim alleged against said defendant. The pleadings and the attached affidavit show that there is no material fact issue as to the defendant Ethel Mae Yazell, and that she is entitled to a judgment that the plaintiff take nothing by reason of its suit against her, that no personal judgment be rendered against her, and that no judgment affecting any separate estate that she may now or hereafter have, be rendered against her, all of which appears as a matter of law from the pleadings of the plaintiff and of this defendant herein.

WHEREFORE, defendant Ethel Mae Yazell prays that after notice and hearing as provided by law, a judgment be rendered herein that the plaintiff take

nothing by reason of its suit against defendant Ethel Mae Yazell, that in any event no personal judgment be rendered against her, and that no judgment be rendered against her affecting any separate property that she may have or hereafter own.

Attorney for Defendant Ethel Mae Yazell

/s/ J. V. Hammett

P. O. Box 111

Lampasas, Texas

ORDER

The foregoing Motion is set for hearing in the United States District Courtroom in Austin, Texas, on the _____ day of _____, 19_____, at _____ o'clock ____M.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of defendant Ethel Mae Yazell for summary judgment has been delivered to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas, attorney of record for plaintiff, by depositing same properly addressed to the said Ernest Morgan, P. O. Box 1701, San Antonio 6, Texas, in a properly stamped envelope in the United States mail at Lampasas, Texas, on the 8th day of December, 1962.

/s/ J. V. Hammett

J. V. Hammett

**THE STATE OF TEXAS
COUNTY OF LAMPASAS**

ETHEL MAE YAZELL, being duly sworn, states that she is one of the defendants in the above entitled action; that she makes this affidavit in support of her motion for summary judgment herein, and that she has personal knowledge of the facts herein set forth.

I.

Affiant is a married woman, and she was a married woman on the date and at the time she signed the note made the basis of plaintiff's suit herein. She was a married woman prior to such time and has been a married woman at all times since and now is a married woman, and at all said pertinent times being married to Delbert L. Yazell.

Affiant's disabilities as a married woman have never been removed. ?

The promises and undertakings made the basis of plaintiff's suit against her were not made for necessities, were not made for the benefit of affiant's separate property, and were not incurred in the management, control and disposition of affiant's separate property. Affiant signed said note solely as surety for her husband, and she did not have the legal capacity at such time or at any time since to bind her separate property by any such promises, contracts or undertakings made the basis of plaintiff's suit herein.

Affiant further states that plaintiff, its agents, servants and employees know and had actual knowledge of

her coverture at all times pertinent to the events and transactions made the basis of plaintiff's suit.

/s/ Ethel Mae Yazell

Sworn to and subscribed by Ethel Mae Yazell before me the undersigned authority, a notary public in and for Lampasas County, Texas, on this 8th day of December, 1962, to which witness my hand and seal of office.

/s/ J. Wain Simmons
Notary Public, Lampasas County, Tex.

My commission expires:
June 1, 1963.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)
VS.) CIVIL ACTION
DELBERT L. YAZELL, d/b/a/)
YAZELL'S LITTLE AGES, and) NO. 1319
ETHEL MAE YAZELL)
Defendant)

DEFENDANT'S ORIGINAL ANSWER

TO SAID HONORABLE COURT:

Now come Delbert L. Yazell, d/b/a/ Yazell's Little Ages, and Ethel Mae Yazell, defendants, and file this their original answer to plaintiff's complaint and thereby respectfully show unto the Court:

I.

Defendants admit the allegations contained in Paragraphs 1, 2 and 3 of the complaint.

II.

Defendants severally say, each for himself, that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of Paragraph 4 of the complaint.

III.

Defendant Ethel Mae Yazell was a married woman on the date and at the time she signed the note made the

basis of plaintiff's suit herein. Prior thereto, at all times since and now, she was and is married, at all of said pertinent times being married to Delbert L. Yazell. Her disabilities of coverture have never been removed. The promises and undertakings made the basis of plaintiff's suit were not for necessities, were not made or the benefit of any separate property of defendant Ethel Mae Yazell, nor were the same incurred in the management, control and disposition of any separate property belonging to her. She signed the note, made the basis of plaintiff's suit solely as security for her husband and she did not have legal capacity to bind herself or her separate property by any such promises, contracts or undertakings made the basis of plaintiff's suit herein.

Plaintiff, its agents and representatives, knew and had actual knowledge of such coverture at all times pertinent to the events and transactions made the basis of plaintiff's suit.

Defendant Ethel Mae Yazell hereby pleads and asserts her coverture in bar of plaintiff's alleged cause of action against her.

IV.

Defendant Delbert L. Yazell alleges that he is entitled to a set-off against any recovery by plaintiffs by reason of the following: The note sued upon was secured by a chattel mortgage covering furniture, fixtures and equipment, together with all merchandise in the store at Lampases heretofore operated by defendant under the name of Yazell's Little Ages. When defendant could not pay the note as it matured, a representative of plaintiff informed him that Small Business Administration would

handle the sale of such property, which then had a reasonable market value of \$10,000.00, or more. Defendant understood from plaintiff's representative that the property would not be sold for an inadequate price, otherwise he would not have turned the property over to plaintiff for sale. Nevertheless, plaintiff sold all such property for a total sum of about \$1500.00, the exact amount being unknown to defendant but well known to plaintiff, which sum was and is wholly inadequate. The negligent sales of defendant's property as aforesaid has damaged defendant in the amount sought to be recovered by plaintiff and defendant is entitled to set off his damages against any amount that plaintiff may recover herein against him.

WHEREFORE, having fully answered plaintiff's complaint herein defendants pray that plaintiff take nothing by its suit against either defendant and the defendant Ethel Mae Yazell specially prays that her defense of coverture be sustained and that she be dismissed from plaintiff's suit; in any event that plaintiff take nothing by reason of its against her and that no personal judgment be rendered against the said Ethel Mae Yazell; that each and both defendants go hence without day and recover their costs herein.

/s/ J. V. Hammett
J. V. Hammett

P. O. Box 111
Lampasas, Texas
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Original Answer of Defendants has been delivered to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas, attorney of record for plaintiff, by depositing same properly addressed to the said Ernest Morgan, P. O. Box 1701, San Antonio 6, Texas, in a properly stamped envelope in the United States mail at Lampasas, Texas, on the 8th day of December, 1962.

/s/ J. V. Hammett

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | |
|-----------------------------|---------------|
| UNITED STATES OF AMERICA) | |
| Plaintiff) | |
| VS.) | |
| DELBERT L. YAZELL, d/b/a/) | CIVIL ACTION |
| YAZELL'S LITTLE AGES, and) | FILE NO. 1319 |
| ETHEL MAE YAZELL) | |
| Defendant) | |

RESPONSE AND AFFIDAVIT IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT
ETHEL MAE YAZELL

TO THE HONORABLE COURT:

Now comes Plaintiff, UNITED STATES OF AMERICA, and in opposition to the Motion of Defendant, Ethel Mae Yazell, For Summary Judgment heretofore filed herein, presents the Affidavit of James R. Woodall which is attached hereto and made a part hereof.

WHEREFORE, Plaintiff prays that the Motion for Summary Judgment heretofore filed in this cause by Ethel Mae Yazell be in all things denied.

/s/ Ernest Morgan

UNITED STATES ATTORNEY
P. O. BOX 1701
SAN ANTONIO, TEXAS

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)

Plaintiff)

VS.

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and) FILE NO. 1319

ETHEL MAE YAZELL)

Defendant)

AFFIDAVIT OF JAMES R. WOODALL
IN OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT BY THEL MAE YAZELL

In opposition to the Motion for Summary Judgment heretofore filed in this cause by Defendant Ethel Mae Yazell, the undersigned Affiant states on his oath:

1. My name is James R. Woodall. I am Acting Regional Director of Small Business Administration, Region X, 1025 Elm Street, Dallas, Texas.

2. I am over 21 years of age, am of sound mind, have never been convicted of any crime or offense and have personal knowledge of every statement herein made and am fully competent to testify to the matters stated herein.

3. In every case where financial assistance is granted by Small Business Administration, by the way of making a loan, the conditions on which the loan will be made are embodied in an official instrument designated Authorization. A copy of the Authorization is furnished to the

borrower who must accept the conditions and fully comply with all of them prior to disbursement of the loan funds.

4. No officer nor employee of the Small Business Administration has any authority to disburse loan funds on any conditions other than those expressly provided by the official Loan Authorization.

5. The loan extended to defendants in the subject case was disbursed pursuant to an Authorization which specifically required that the note and all instruments of hypothecation be signed by borrowers wife, Ethel Mae Yazell.

/s/ James R. Woodall
James R. Woodall
ACTING REGIONAL DIRECTOR
REGION X

ACKNOWLEDGMENT

Sworn to and subscribed before me by James R. Woodall, the said Affiant on this 16th day of January 1963.

/s/ Eddie Mae Britton
Eddie Mae Britton
Notary Public in and for Dallas
County, Texas

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | |
|-----------------------------|---------------|
| UNITED STATES OF AMERICA) | |
| Plaintiff) | |
| VS.) | |
| DELBERT L. YAZELL, d/b/a/) | CIVIL ACTION |
| YAZELL'S LITTLE AGES, and) | FILE NO. 1319 |
| ETHEL MAE YAZELL) | |
| Defendant) | |

PLAINTIFF'S MOTION FOR JUDGMENT ON
THE PLEADINGS AND FOR SUMMARY
JUDGMENT

TO THE HONORABLE COURT:

Comes now Plaintiff, UNITED STATES OF AMERICA and pursuant to Rule 12 (c) and Rule 56 of the Federal Rules of Civil Procedure, moves the Court for judgment on the pleadings and/or for summary judgment for all relief sought by Plaintiff in the complaint heretofore filed herein. In support of this motion, Plaintiff would show the Court:

1. The Answer of Defendants heretofore filed herein admitted the allegations of paragraphs 1, 2, and 3, of the Complaint.

2. Paragraph ~~H~~ of Defendant's Original Answer in response to the allegations of paragraph 4 of Plaintiff's Complaint are insufficient to constitute a denial thereof. The asserted defense of Defendant does not comply with the requirements of Rule 8 (c) of the Federal Rules of

Civil Procedure and pursuant to the provisions of Rule 8 (d) all allegations in paragraph 4 of the Complaint should be taken as admitted.

3. The Affidavit of James R. Woodall annexed to a Pleading designated as Response and Affidavit in Opposition to Motion for Summary Judgment by Defendant Ethel Mae Yazell, which Pleading and annexed Affidavit have heretofore been filed herein, is fully incorporated by reference herein and made a part hereof.

4. To secure the indebtedness evidenced by the Note alleged in paragraph 3 of the Complaint, Defendants Delbert L. Yazell, and Ethel Mae Yazell executed a chattel mortgage covering certain stocks of goods and furniture and fixtures located on their premises in Lampasas, Texas. A true copy of this instrument is annexed hereto marked "Exhibit A", and made a part hereof.

5. All of the property covered by the aforesaid mortgage was sold by Defendants, with the consent of Small Business Administration, with the exception of certain items of furniture, fixtures, and machinery which were sold at public action on August 27, 1962 by Small Business Administration employee Charles Motz, pursuant to the terms of the instrument of mortgage. An itemized list of the items sold at auction on Defendant's premises on August 27, 1962 pursuant to the terms of the mortgage, is annexed hereto as "Exhibit B", and made a part hereof.

6. The Affidavit of L. W. Massett relating to disposition of the mortgaged property is annexed hereto and made a part of this Motion.

7. There is no genuine issue as to any material facts and plaintiff is entitled to a judgment for full recovery against Defendants, jointly and severally as a matter of law.

WHEREFORE, Plaintiff prays for summary judgment for all relief sought in the Complaint.

/s/ Ernest Morgan

UNITED STATES ATTORNEY
P. O. BOX 1701
SAN ANTONIO, TEXAS

- (1) The entire stock of goods, wares and merchandise of the business known and conducted as Yazell's Little Ages, and being located at 410 South Live Oak

Street, in Lampasas, Texas, all of which said goods, ware and merchandise are in the possession of the undersigned mortgagors doing business as Yazell's Little Ages.

It is the intention of the parties to this chattel mortgage to include and here is hereby expressly included in and made subject to this chattel mortgage all future additions to or substitutions for said stock of goods, wares and merchandise as the same exists on this date, said additions and/or substitutions being contemplated. In this connection it is expressly agreed between the parties hereto that all the proceeds of sales from said stock of goods, wares and merchandise made in the regular course of business, or otherwise, shall be applied to the purchase of new goods, wares and merchandise to be substituted for the goods, wares and merchandise sold in the regular course of business, unless the said proceeds be paid on the indebtedness secured by this mortgage.

Of the indebtedness secured hereby, the sum of \$9,000.00 has been advanced by mortgagee as purchase money to pay for the stock of goods, wares and merchandise covered by this chattel mortgage, and the mortgagors expressly covenant with the mortgagee that they will at all times maintain their inventory of said goods, wares and merchandise in an amount not less than \$9,000.00 so long as any part of purchase money aforesaid remains unpaid. It is further agreed that all payments made on the principal of the above described indebtedness shall be credited on the unpaid balance thereof, and shall be conclusively presumed to have been allocated to said purchase money in the same proportion that the original purchase money herein stated bears to the total indebtedness secured hereby.

(2) All of the furniture, fixture and equipment in Yazell's Little Ages, located at 410 South Live Oak Street, in Lampasas, Texas, or hereafter to be acquired by the said mortgagors in connection with said business, including without limitation of the foregoing generality the following items: 1 Triple Mirror 24x48"; 2 all glass show cases; 2 Hanger Bins 48x84x28" with doors; 1 Hanger Bin, 48x24x24"; 2 Hanger Bins, left, 48x84x24"; 2 Twin Shelf Bins 48"; 2 single Shelf Bin 48x94x24"; 1-3 complete shoe shelf; 24-24x28x35" tables; 1 24x48x33" table.

TO HAVE AND TO HOLD all and singular the above discribed property unto said Mortgagee, his, her, it or their successors, heirs and assigns forever. And the Mortgagors do hereby bind themselves, their successor, assigns, heirs, executors and administrators to warrant and forever defend the title to said property, and every part thereof, unto the said Mortgagee, his, her, it or their successors, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

THIS CONVEYANCE, HOWEVER, is intended as a mortgage to secure said Mortgagee, his, her, it or their successors heirs and assigns, in the payment of any and all indebtedness due and owing by Mortgagors to Mortgagee, whether the same be evidenced by personal notes, overdrafts, endorsements, guarantees or otherwise, as well as any other indebtedness now due or that may hereafter become due and owing to said Mortgagee, which indebtedness accrued, or hereafter to accrue, it is agreed shall be payable to the Mortgagee or order at Dallas, in Dallas County, Texas, and bear interest at the rate of (3) per cent per annum from date of accrual until paid

and the same shall stand secured by, and payable under this mortgage, and more especially that indebtedness evidenced by one certain promissory note of even date herewith for the principal sum of TWELVE THOUSAND AND NO/100 DOLLARS (\$12,000.00), executed by Delbert L. Yazell and wife, Ethel Mae Yazell, d/b/a Yazell's Little Ages, payable to the order of Small Business Administration, an Agency duly created under and by virtue of an Act of Congress, having its principal office in Washington, in the District of Columbia, and a Regional Office at 1114 Commerce Street, Dallas, Texas, principal and interest being payable in monthly installments of One Hundred Twenty and No/100 Dollars (\$120.00), each, including interest, one on the 10th day of each month hereafter, commencing on the 10th day of November, 1957, and continuing until the principal and interest are fully paid, except that the final payment of principal and interest, if not been paid, shall be due and payable on the 10th day of June, 1967.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions made for the purpose of inducing said Mortgagee to part with certain monies, from time to time, and for any other purpose hereinafter set out, and the security herein given is accepted as follows, to wit:

FIRST. That the Mortgagors are the full owners of said property, and have a perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named.

SECOND. That so long as the possession of said property is permitted to remain with Mortgagors the same shall not be sold, mortgaged or moved from the

places above named without the written consent of Mortgagee, (all retail sales made in good faith in the regular course of business from the stock of goods, wares and merchandise, if any, covered hereby pursuant to Article 4000, Revised Civil Statutes of Texas, as amended, sale excepted) and that Mortgagors will use the utmost care and diligence to preserve said property from waste or destruction and to have the same forthcoming for delivery to the Mortgagee, or purchaser, in as good condition as the same now is.

THIRD. That said property is of the reasonable aggregate cash value of **TWELVE THOUSAND AND NO/100 (\$12,000.00)** Dollars, at the execution and delivery hereof, and the Mortgagors, will carry fire, and extended coverage insurance on said property, if insurable, in good and reliable insurance companies to be selected by the Mortgagee, with loss, if any, payable to Mortgagee—which policy shall be kept by Mortgagee.

FOURTH. All of the statements and representations herein made and contained are made for the purpose of inducing the holder of the indebtedness hereby secured to advance the sums of money evidenced by the notes secured hereby and Mortgagors are hereby estopped from claiming any deviation or change therefrom; it being expressly understood that this instrument has been completely read and understood by the Mortgagors, and if not we are hereby bound by the contents hereof on account of failure to acquaint ourselves with such contents.

It is understood and agreed that the mortgage lien hereby created shall extend to any renewals or extension of the indebtedness hereby secured, or any other

indebtednesses, however said renewals or extensions may be evidenced, and this lien shall continue to be in force until all of the liabilities and indebtednesses above referred to, and each and every extension and renewal thereof shall have been fully paid.

It is further understood and agreed that if at any time the said mortgagor should move, or attempt to move, all or any part of the above described property outside of the county where the same is situated (as above stated), or if at any time, in the judgment of said Mortgagee, the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said Mortgagee's security or to render said Mortgagee insecure, or if the Mortgagors without the consent of the Mortgagee should surrender possession of any of said property, or sell any part thereof, (all retail sales made in good faith in the regular course of business from the stock of goods, wares and merchandise, if any, covered hereby pursuant to Article 4000, Revised Civil Statutes of Texas, as amended, sale excepted) or if Mortgagors not be full owner of said property or the same be not free from incumbrance (unless otherwise herein stated), or this not be a first lien on said property (unless otherwise herein stated), or if they make default in the payment of said indebtedness, or any part or installment thereof either principal or interest, as the same shall become due and payable, or if the property be taken into the custody of any governmental official, for any purpose, or any receiver, trustee in bankruptcy or assignee for the benefit of creditors or Court, or if the same be not kept in the same repair and condition as it now is, or if all taxes due and to become due thereon be not promptly paid before any penalty under the law at

taches, or if Mortgagors fail to keep said property insured as herein agreed, or if the Mortgagors should violate any of the other conditions of this mortgage, then, in any of such events, or either of them, the said Mortgagee at the option of him, her, it, or their successors, heirs or assigns, may declare all of the indebtedness above referred to immediately due and payable, and take possession of and sell said property as herein provided.

It is further understood and agreed that in the event default be made by said Mortgagors in the payment of the indebtedness above described, when the same become due and payable or are declared due and payable according to the options herein, then the said Mortgagee shall have the right for himself, herself or itself, or through any agent, to take immediate possession of any or all of said property and to either sell the same at private sale, without notice to said Mortgagors, or sell the same at public sale to the highest bidder in any county or place selected by Mortgagee, first giving ten days notice of the time, place and terms of such public sale by posting written or printed notices of said sale at three public places in said County selected for such sale—one of which shall be posted at the Court House door of said County and one at the place of sale, said sale to be for cash or credit, or for part cash and part credit, as the Mortgagee may elect—at any of which sales it shall not be necessary to have actual possession of said property or to have it present when such sale is made, and the person thus selling said property shall deliver to purchaser thereof a bill of sale therefor binding the Mortgagors, their successors, heirs, assigns executors and administrators forever, or may sell the same in the manner

prescribed by law for sales of personal property under execution at the time of said sale, the proceeds of such sale shall be applied as follows:

FIRST—to the payment of all expenses incident to seizure and sale, including a commission of Ten (10%) per cent to the person selling said property.

SECOND—to the payment of the entire amount then owing on the indebtedness hereby secured, including principal interest and attorney's fees.

THIRD—to the payment of any sum or sums expended by mortgagee under the terms hereof.

FOURTH—any surplus after the payments as above set out shall be paid over to the Mortgagors or order.

Or the said Mortgagee may, if he, she or it elects enforce his, her or its lien by suit in the Court of proper jurisdiction and the Morgagors hereby specially waive all rights of damages and claims, directly or indirectly resulting from any of such reposessions or sales, or by reason of issuance and levy of any statutory writ on or against said property, or any part thereof; and the Mortgagee, his, her or its successors, heirs, assigns or representatives may become the purchaser of said property at any of said sales. Any holder of the indebtedness hereby secured shall have the right to pay taxes and insurance on the property herein described and in such event such sums so expended shall be secured by this lien on said property and shall bear interest at the rate of Ten (10%) per centum per annum, and all monies collected under any of such insurance policies shall be applied on the indebtedness hereby secured.

It is further understood and agreed that in the event

the indebtednesses secured, or any part thereof, hereby are placed in the hands of an attorney for collection, or if collected by suit through any Court, including the Bankruptcy and Probate Courts, Ten (10%) per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be added to said indebtedness as attorneys fees for the cost of collection, and in the Probate and Bankruptcy Courts whether the same is matured or not.

It is further understood and agreed that all expense in connection with the securing, taking and caring for any property above described, or placing the same in the same condition as it now is, shall be borne by the Mortgagors and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be cancelled and released, at the expense of the Mortgagors, and the terms of this mortgage shall inure to the benefit of any holder of the indebtednesses secured hereby.

A bill of sale, hereunder, from the Mortgagee, or any of his, her or its agents, attorneys, successors, heirs; assigns, executors or administrators, acting as such, conveying said property or any part thereof, shall be full and conclusive evidence and proof that all of the terms, conditions and prerequisites required herein have been fully complied with and the said Mortgagors hereby ratify and confirm any and all acts of the Mortgagee, his, her or its agents attorneys, successors, heirs, assigns, executors or administrators, acting as such, done under and by virtue hereof.

The security herein conveyed and given shall not

be affected by nor affect any other security taken for the indebtedness hereby secured, or any part thereof, and any extensions may be made of the indebtedness and this lien and any releases may be executed of the security, or any part thereof, herein conveyed without affecting the priority of this lien or the validity thereof with reference to any third party, and the holders of said indebtedness shall not be confined to any election of remedies if they choose to foreclose this lien by suit. The right to sell under the terms hereunder shall also exist cumulative with said suit and one method shall not bar the others, but both may be exercised at the same or different times, nor shall one be a defense to the other.

WITNESS our hands at Lampasas, Texas, this 10th day of July, 1957.

/s/ Delbert L. Yazell
Delbert L. Yazell

/s/ Ethel Mae Yazell
Ethel Mae Yazell

/d/ba/ Yazell's Little Ages

THE STATE OF TEXAS
COUNTY OF LAMPASAS

BEFORE ME, the undersigned authority, on this day personally appeared DELBERT L. YAZELL, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office, this the
18 day of July, A.D. 1957.

/s/ Katharine Shands
Notary Public Lampasas
County, Texas

THE STATE OF TEXAS
COUNTY OF LAMPASAS

BEFORE me, the undersigned authority, on this day
personally appeared ETHEL MAE YAZELL, wife of
DELBERT L. YAZELL, known to me to be the person
whose name is subscribed to the foregoing instrument,
and having been examined by me privily and apart from
her husband, and having the same fully explained to her,
she, the said ETHEL MAE YAZELL, acknowledged such
instrument to be her act and deed and declared that she
had willingly signed the same for the purposes and con-
sideration therein expressed, and that she did not wish
to retract it.

GIVEN under my hand and seal of office, this the
18 day of July, A.D. 1957.

/s/ Katharine Shands
Notary Public Lampasas
County, Texas
Lampasas, Texas

Received from Small Business Administration Chat-
tel Mortgage of which this is a copy, this day filed for
registration in my office.

County Clerk Lampasas
County, Texas

By Deputy.

For value received, the undersigned hereby sells and assigns unto

the indebtedness described in the within chattel mortgage and all of undersigned's right, title and interest in and to said chattel mortgage and the property covered thereby, and hereby authorizes said party to collect said debt and release said mortgage.

Executed this day of, 19....

WITNESSES:

.....
.....
.....

"EXHIBIT B"

ITEMS SOLD AT SUMMARY SALE ON AUG. 27, 1962

| Item | Amount | Purchaser | Address |
|--|---------|------------------|-----------------|
| 17 Wood Sectional wall cases | \$70.00 | Stanley Weiss | Killeen, Texas |
| 1 Hat bar section w/mirror | 2.00 | | |
| 1 3 way mirror section | 5.00 | | |
| 2 Glass show cases | 40.00 | | |
| 10 Merchandise tables | 60.00 | | |
| 2 Wood straight chairs; shoe fitting stool & shoe mirror | 4.00 | | |
| 1 Sturges cash register | 17.00 | | |
| 1 Remington Adding machine | 27.00 | | |
| 1 Lot T stands & display fixtures | 20.00 | | |
| 1 Lot plastic hangers | 10.00 | | |
| 2 Glass merchandise sections | 7.50 | Leonard Rawlings | Lampasas, Texas |
| 10 Merchandise tables | 60.00 | | |
| 2 Display tables | 2.00 | | |
| 2 Wrapping counters | 15.00 | | |

| | | | |
|----------------------------------|-----------------|--------------------|-----------------|
| 2 Merchandise counters | 16.50 | | |
| 1 Merchandise table with drawers | 26.00 | | |
| 4 Merchandise tables | 24.00 | Russell Miller | Lampasas, Texas |
| 4 Mannequins | 25.00 | | |
| 4 Chrome dress & skirt racks | 25.00 | R. E. Brauer | Lampasas, Texas |
| 1 Chrome settee | 9.00 | | |
| 4 Display tables | 8.00 | Mrs. Glynn Parkins | Lampasas, Texas |
| 1 Metal file cabinet | 18.00 | | |
| 1 Desk | 1.00 | | |
| 1 Jewelry display case | .25 | | |
| TOTAL | <u>\$492.25</u> | | |

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---------------------------|---|---------------|
| UNITED STATES OF AMERICA |) | |
| Plaintiff |) | |
| v. |) | CIVIL ACTION |
| Delbert L. Yazell, d/b/a |) | |
| YAZELL'S LITTLE AGES, and |) | FILE NO. 1319 |
| Ethel Mae Yazell |) | |
| Defendant |) | |

AFFIDAVIT OF L. W. MASSETT
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

In support of Plaintiff's Motion for Summary Judgment heretofore filed in this cause, the undersigned Affiant states on his oath:

1. My name is L. W. Massett, I am Chief of the Loan Liquidation Section, Financial Assistance Division, Region X, Small Business Administration, 1025 Elm Street, Dallas, Texas. In this capacity I am charged with the responsibility for supervising all Region X loan liquidation cases, including specifically the liquidation of and realization on all collateral mortgaged to secure the indebtedness evidenced by the Note alleged in paragraph 3 of the Complaint filed in this cause.

2. I am over 21 years of age, am of sound mind, have never been convicted of any crime or offense and

have personal knowledge of every statement herein made and am fully competent to testify to the matters stated herein.

3. Except for the activities of Employee Charles Motz, as related hereinafter, no agent or employee of the Small Business Administration ever been authorized to agree to take possession of any of the property of the Defendant for sale nor has any agent or employee ever taken possession of any of Defendant's property nor made any sale thereof.

4. All property covered by the mortgage named in paragraph 4 to Plaintiff's Motion for Summary Judgment, excepting only that personal property specifically enumerated in Exhibit B to Plaintiff's Motion was sold by Defendants with the consent of Small Business Administration. All funds received from such sales were by Cashier's checks made payable jointly to Defendant Delbert L. Yazell and Small Business Administration, and were tendered to Small Business Administration by Delbert L. Yazell after having first been endorsed by him. At no time did any employee or agent of Small Business Administration ever take possession of any of such merchandise. Delivery of all such merchandise to purchasers were made directly by Mr. Yazell.

5. The remaining items of furniture, fixtures, and machinery, as itemized in Exhibit B, annexed to Plaintiff's Motion for Summary Judgment which were not sold by Mr. Yazell, were sold by foreclosure sale by Charles Motz, a regular employee of Small Business Administration on the premises of Defendant's in Lampasas, Texas on August 27, 1962, at public auction for cash to the highest bidder. Every detail in connection with the said

foreclosure sale was in strict compliance with the instrument of mortgage and in accordance with all laws relating thereto.

6. All proceeds of the aforesaid sales by Defendants and all proceeds recived from the foreclosure sale have been credited to the indebtedness of Defendants prior to filing of the Complaint herein.

/s/ L. W. MASSETT

Sworn to and subscribed before me by L. W. Massett, the said Affiant on this 16th day of January 1963.

/s/ Eddie Mae Britton
Notary Public in and for Dallas
County, Texas

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)

VS.

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and)

ETHEL MAE YAZELL)

Defendant)

FILE NO. 1319

STATEMENT MOTION FOR A MORE DEFINITE

Comes now Plaintiff, UNITED STATES OF AMERICA, and subject to its Motion for Summary Judgment heretofore filed, and in the alternative to said Motion for Summary Judgment, and only in the event the aforesaid Motion for Summary Judgment should not be fully granted, and would show the Court that all of the allegations of paragraph IV^o of Defendant's Original Answer, are so vague and ambiguous that Plaintiff cannot be reasonably required to frame a responsive pleading thereto nor prepare for trial of any issue which might be raised by said pleading.

WHEREFORE, Plaintiff prays that an order be entered requiring Defendants, within ten days after notice of entry thereof, to plead fully in detail the full name of any representative of Plaintiff with whom he made any agreement, or whom he claims informed him that Plaintiff would handle the sale of any of his property, the dates on which such agreements or representations were

made; the details of the substance of such agreements or representations; whether or not they were written or oral; an itemized and detailed description of every piece of personal property which Defendants claim Plaintiff agreed to take possession of; an itemized and detailed list of every item of personal property which Defendant claims Plaintiff did take possession of, both of which descriptive lists shall be in sufficient detail so that identification of the property may be made therefrom; the source from which Defendants purchased such property; the dates on which it was purchased; the cost price in cash paid for such property; the dates on which Defendant claims Plaintiff's representative took possession of such property; details of the manner and circumstances in which Defendants claim possession was given to Plaintiff's representative; the names of any purchasers to whom Defendants claim Plaintiff sold any of Defendant's property; and an itemized allegation of the specific act of any representative of Plaintiff which Defendant claims to be negligent, including the time and place of the alleged commission of said act.

/s/ Ernest Morgan

UNITED STATES ATTORNEY
P. O. BOX 1701
SAN ANTONIO

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)

VS.

CIVIL ACTION

Delbert L. Yazell, d/b/a)
YAZELL'S LITTLE AGES, and) FILE NO. 1319
Ethel Mae Yazell)
Defendants)

HEARING ORDER AND NOTICE OF
O R D E R

The Motion for Summary Judgment by Defendant, Ethel Mae Yazell, is set for hearing in the United States District Court Room in Austin, Texas, on the 28th day of January, 1963 at 9:00 O'Clock A. M.

/s/ Ben H. Rice Jr.

Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing response to Motion for Summary Judgment by Ethel Mae Yazell, a true copy of the Affidavit of James R. Woodall in opposition to said Motion, and the foregoing order setting time and place for hearing thereon, has been delivered to the Honorable J. V. Hammett, attorney of record for Defendant Ethel Mae Yazell by depositing them in the United States mail at San Antonio, Texas on the 17th day of January 1963 properly addressed to him at P. O. Box 111, Lampasas, Texas.

/s/ William O. Murray, Jr.

Asst. U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)

VS. CIVIL ACTION

Deibert L. Yazell, d/b/a)
YAZELL'S LITTLE AGES, and) FILE NO. 1319
Ethel Mae Yazell)
Defendants)

HEARING ORDER AND NOTICE OF
ORDER

Plaintiff's Motion for Judgment on the Pleadings and for Summary Judgment is set for hearing in the United States District Court Room in Austin, Texas, on the 28th day of January, 1963 at 9:00 O'Clock A. M.

/s/ Ben H. Rice Jr.
Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Motion for Judgment on the Pleadings and for Summary Judgment, and the foregoing order setting time and place for hearing thereon, has been delivered to the Honorable J. V. Hammett, attorney of record for Defendant Ethel Mae Yazell by depositing them in the United States mail at San Antonio, Texas, on the 17th day of January 1963 properly addressed to him at P. O. Box 111, Lampasas, Texas.

/s/ William O. Murray, Jr.
Asst. U. S. Attorney

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
UNITED STATES DISTRICT COURT
FOR THE

UNITED STATES OF AMERICA)

Plaintiff)

VS.

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and) FILE NO. 1319

ETHEL MAE YAZELL)

Defendant)

**REPLY OF DEFENDANT ETHEL MAE YAZELL TO
PLAINTIFF'S OPPOSITION TO HER MOTION FOR
SUMMARY JUDGMENT**

Now comes the defendant ETHEL MAE YAZELL and respectfully replies to plaintiff's opposition to her motion for summary judgment and respectfully shows:

1. The affidavit of James R. Woodall in opposition to this defendant's motion for summary judgment is insufficient as a matter of law to show that this defendant's motion for summary judgment should not be granted in that the same does not deny nor contest any of the facts or showing upon which this defendant's motion for summary judgment is predicated, and does not show any cause of action against this defendant other than a suit for a community debt with respect to community property, for none of which this defendant or her separate property and estate is personally liable.

2. As additional support for her motion for summary judgment, an affidavit of this defendant of further

facts is attached hereto and made a part hereof for all purposes.

WHEREFORE, this defendant prays that her motion for summary judgment heretofore filed herein be granted.

/s/ J. V. Hammett
J. V. Hammett

P. O. Box 111
Lampasas, Texas
Attorneys for Defendants

THE STATE OF TEXAS)
COUNTY OF LAMPASAS)

ETHEL MAE YAZELL, being duly sworn, states that she is one of the defendants in the above entitled action; that she makes this affidavit in support of her opposition to plaintiff's motion for judgment on the pleadings and/or summary judgment against her; that she has personal knowledge of the facts stated herein; that she is over twenty-one years of age, of sound mind, has never been convicted of any crime or offense, and is fully competent to testify to the matters stated herein.

Affiant states that all of the facts stated in her affidavit of December 8, 1962 and attached to her motion for summary judgment in this cause are true and correct.

Additionally thereto, affiant further states that the debt sued upon by plaintiff in this cause is, under the laws of the State of Texas, a community property debt of the marriage between affiant and defendant Delbert

L. Yazell, and that all of the property covered by the mortgage referred to in and attached to plaintiff's motion for judgment on the pleadings and/or for summary judgment was property belong solely to the community estate of affiant and defendant Delbert L. Yazell, i.e. same was acquired by purchase after their marriage and was not acquired by either her or defendant Delbert L. Yazell by gift, devise or descent and was not owned by her prior to her marriage with defendant.

/s/ Ethel Mae Yazell

Sworn to and subscribed by Ethel Mae Yazell before me the undersigned authority, a notary public in and for Lampasas County, Texas, on this 26th day of January, 1963, to which witness my hand and seal of office.

My commision expires:

June 1, 1963.

/s/ Katharine Shands
Notary Public, Lampasas County,
Texas.

Plaintiff)

VS.

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and) FILE NO. 1319

ETHEL MAE YAZELL)

Defendant)

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS
AND/OR FOR SUMMARY JUDGMENT**

TO SAID HONORABLE COURT:

Now comes DELBERT L. YAZELL, dba YAZELL'S LITTLE AGES and ETHEL MAE YAZELL, defendants in the above styled cause and file this opposition to plaintiff's motion for judgment on the pleadings and/or for summary judgment, for all relief sought by plaintiff in its complaint herein, and would respectfully show:

1. Plaintiff is not in any event entitled to a personal judgment against defendant Ethel Mae Yazell, nor is it entitled to any kind of judgment that might affect the separate property and estate of the said Ethel Mae Yazell, whether now owned or hereafter acquired. Further in this connection defendant Ethel Mae Yazell shows that she is neither an indispensable, necessary nor proper party to plaintiff's suit for debt or foreclosure against defendant Delbert L. Yazell.

2. Plaintiff is entitled to a judgment for its debt against Delbert L. Yazell dba Yazell's Little Ages, as demanded in plaintiff's complaint herein, but it is not entitled to any judgment on the pleadings or by way of summary judgment on the setoff alleged by defendant against any recovery of the plaintiff, as alleged by paragraph IV of said defendant's original answer herein.

3. Defendants deny the allegation in paragraph 5. of plaintiff's motion on the pleadings and/or summary judgment, i.e. that all of the property covered by the mortgage in question was sold by defendants with the consent of Small Business Administration, but instead defendant would show that Small Business Administration sold all of the merchandise as well as the furniture, fixtures and machinery referred to in such paragraph of plaintiff's motion.

4. The showing of plaintiff in support of its motion on the pleadings and/or summary judgment is insufficient in that it does not show the absence of genuine issue as to material facts against either defendant as to defendants alleged right of set off against plaintiff's recovery against defendant Delbert L. Yazell.

5. This opposition is supported by defendant's original answer, by the motion of defendant Ethel Mae Yazell for summary judgment and the affidavit affixed thereto, as well as by the affidavits of each defendant affixed to this opposition, all of which are hereby fully incorporated by reference herein and made a part hereof.

WHEREFORE defendants pray that plaintiff's motion for judgment on the pleadings and/or for summary judgment be in all things denied excepting only as

to plaintiff's right for judgment for debt against the defendant Delbert L. Yazell.

/s/ J. V. Hammett
J. V. Hammett
P. O. Box 111
Lampasas, Texas
Attorney for Defendants

THE STATE OF TEXAS)
COUNTY OF LAMPASAS)

ETHEL MAE YAZELL, being duly sworn, states that she is one of the defedants in the above entitled action; that she makes this affidavit in support of her opposition to plaintiff's motion for judgment on the pleadings and/or summary judgment against her; that she has personal knowledge of the facts stated herein; that she is over twenty-one years of age, of sound mind, has never been convicted of any crime or offense, and is fully competent to testify to the matters stated herein.

Affiant states that all of the facts stated in her affidavit of December 8, 1962 and attached to her motion for summary judgment in this cause are true and correct.

Additionally thereto, affiant further states that the debt sued upon by plaintiff in this cause is, under laws of the State of Texas, a community property debt of the marriage between affiant and defendant Delbert L. Yazell, and that all of the property covered by the mortgage referred to in and attached to plaintiff's motion for judgment on the pleading and/or for summary judgment was property belonging solely to the community estate

of affiant and defendant Delbert L. Yazell, i.e. same was acquired by purchase after their marriage and was not acquired by either her or defendant Delbert L. Yazell by gift, devise or descent and was not owned by her prior to her marriage with said defendant.

/s/ Ethel Mae Yazell

Sworn to and subscribed by Ethel Mae Yazell before me the undersigned authority, a notary public in and for Lampasas County, Texas, on this 26th day of January, 1963, to which witness my hand seal of office.

/s/ Katharine Shands
Notary Public, Lampasas County,
Texas.

My commission expires:
June 1, 1963.

THE STATE OF TEXAS)
COUNTY OF LAMPASAS)

DELBERT L. YAZELL, being duly sworn, states that he is one of the defendants in the above entitled action; that he makes this affidavit in support of his opposition to plaintiff's motion for judgment on the pleadings and/or summary judgment against him; that he has personal knowledge of the facts stated herein; that he is over twenty-one (21) years of age, of sound mind, has never been convicted of any crime or offense and is fully competent to testify to the matters stated herein.

1. Affiant Delbert L. Yazell states upon oath that he has read the affidavit of his wife Ethel Mae Yazell dated December 8, 1962 and attached to her motion for summary judgment in this cause, and also the affidavit made by her this date and attached to this opposition to plaintiff's motion for judgment on the pleadings and/or for summary judgment, and hereby states that each and every fact and statement contained in each and both of said affidavits of Ethel Mae Yazell are true and correct.

2. This affiant states further upon oath that he could not pay his debts in July 1962 and that in addition to the debt and mortgage due Small Business Administration, as alleged by plaintiff, he was at such time indebted in divers amounts to more than twenty different firms for merchandise sold and delivered to the store operated by this defendant under the name of Yazell's Little Ages at Lampasas, Texas; that he so advised a Mr. Flynn who was a representative of Small Business Administration and that Mr. Flynn was familiar with all such facts at such time; that he composed and settled all of his debts with all of such general creditors at ten cents on the dollar, using funds that he borrowed from his brother for such purpose; that he had then and prior thereto advised Small Business Administration that he could not pay but that all of the merchandise, furniture and fixtures in such store then had a reasonable market value in excess of TWELVE THOUSAND DOLLARS (\$12,000.00), which was more than sufficient to pay Small Business Administration in full; that he offered to sell such merchandise and fixtures or would turn the same over to Small Business Administration to sell and liquidate such debt; that he was advised by representatives of Small Business Ad-

ministration by mail, in person and by telephone that he should not sell the same but that Small Business Administration would do so. Such representatives of Small Business Administration further advised him that they had outlets and sources for such property that enabled them to sell the same to better advantage than this defendant, and this defendant was perfectly willing for them to do so.

Small Business Administration procured a man from Houston, whose name is not recalled by affiant, to purchase all merchandise in the store, that the man from Houston came to the store and advised affiant that he had bought such merchandise from Small Business Administration; affiant did not deliver such merchandise to the man from Houston but did then telephone Small Business Administration and affiant is not certain at this time as to the identity of the persons he talked with. Such representative advised him in such telephone conversation to deliver the merchandise to the man from Houston, to accept his cashier's check for ONE THOUSAND DOLLARS (\$1,000.00), to endorse the same and mail it to Small Business Administration, all of which affiant did, notwithstanding that such merchandise had a cash market value in excess of FIVE THOUSAND D O L L A R S (\$5,000.00).

Thereafter, a representative of Small Business Administration did hold a foreclosure sale and sell thereat the furniture and fixtures listed by plaintiff, but at the time of such sale and prior thereto the representative conducting such sale, by name of Charles Motz, advised this affiant that he did not intend to sell the same for nothing. Nevertheless and without prior knowledge or

consent of this defendant, he did sell the same for nothing, i.e. for less than ten (10%) percent of the fair cash value thereof.

This affiant states further that at the time of such foreclosure sale he asked Mr. Motz if he, the defendant, should not have his attorney present, to which Mr. Motz replied to the effect that the attorney had been advised thereof and implied that defendant did not need his attorney.

3. Affiant states further that he cooperated fully and in every way with Small Business Administration representatives with respect to the liquidation of such store but affiant states further that he did so solely upon the representations of Mr. Flynn, Mr. Motz and other representatives of Small Business Administration whose names are not now recalled, to affiant to the effect that they could make a more advantageous disposition of all such property than could this affiant, and that in any event the debt upon which plaintiff now sues could be liquidated thereby.

/s/ Delbert L. Yazell

Sworn to and subscribed by Delbert L. Yazell before me the undersigned authority, a notary public in and for Lampasas County, Texas, on this 26th day of January, 1963, to which witness my hand and seal of office.

/s/ Katharine Shands
Notary Public, Lampasas County, Tex.

My commission expires:
June 1, 1963.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
PLAINTIFF)

VS

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)
YAZELL'S LITTLE AGES, AND)
ETHEL MAE YAZELL)
DEFENDANT)

FILE NO. 1319

DEFENDANTS' FIRST AMENDED

ORIGINAL ANSWER
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
PLAINTIFF)

VS

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)
YAZELL'S LITTLE AGES, AND)
ETHEL MAE YAZELL)
DEFENDANT)

FILE NO. 1319

DEFENDANTS' FIRST AMENDED
ORIGINAL ANSWER

TO SAID HONORABLE COURT:

Comes now DELBERT L. YAZELL, d/b/a/ YAZELL'S LITTLE AGES, and ETHEL MAE YAZELL, defendants, and file this their first amended original answer to plaintiff's complaint, and thereby show:

I

Defendants admit the allegations contained in Paragraphs 1, 2 and 3 of the complaint.

II

Defendants severally say, each for himself, that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of Paragraph 4 of the complaint.

III

Defendant Ethel Mae Yazell was a married woman on the date and at the time she signed the note made the

basis of plaintiff's suit herein. Prior thereto, at all times since and now, she was and is married, at all of said pertinent times being married to Delbert L. Yazell. Her disabilities of coverture have never been removed. The promises and undertakings made the basis of plaintiff's suit were not for necessities, were not made for the benefit of any separate property of defendant Ethel Mae Yazell, nor were the same incurred in the management, control and disposition of any separate property belonging to her. She signed the note, made the basis of plaintiff's suit solely as security for her husband and she did not have legal capacity to bind herself or her separate property by any such promises, contracts or undertakings made the basis of plaintiff's suit herein.

Plaintiff, its agents and representatives, knew and had actual knowledge of such coverture at all times pertinent to the events and transactions made the basis of plaintiff's suit.

Defendant Ethel Mae Yazell hereby pleads and asserts her coverture in bar of plaintiff's alleged cause of action against her.

IV

Defendant Delbert L. Yazell alleges that he is entitled to offset any recovery by plaintiff to the extent of any such recovery by reason of the following:

(1) The debt asserted by plaintiff is a community debt of defendants Delbert L. Yazell and wife Ethel Mae Yazell, and the chattel mortgage given by them to plaintiff to secure payment thereof covered community property of said marriage.

(2) The note sued upon was secured by a chattel

mortgage executed by him and his wife covering furniture, fixtures and equipment, together with merchandise in the store at Lampasas heretofore operated by him under the business name of Yazell's Little Ages. He could not pay his debts in July 1962 at which time he was indebted to Small Business Administration upon the debt forming the basis of plaintiff's suit herein which debt was secured, and to other persons who were not secured for merchandise and supplies sold and delivered to the store, Yazell's Little Ages. Being unable to pay his debts, this defendant composed and settled all of his general creditor obligations for twenty cents on the dollar, using funds that he borrowed from his brother for such purpose.

(3) Said defendant advised a representative of Small Business Administration, to-wit, Mr. Flynn, of the situation and offered to sell such merchandise and fixtures on which plaintiff held a chattel mortgage, to liquidate the same and such debt.

(4) Said defendant was advised by representatives of Small Business Administration in person and by telephone that they, not he, would sell the same because they had outlets and sources for such property that enabled them to sell the same to better advantage than defendant could do.

(5) Small Business Administration procured a purchaser for the merchandise from Houston, Texas, who called at defendant's store in Lampasas for the purpose of, and he did inspect the merchandise in the store. Defendant was advised by such purchaser that he had bought the merchandise from Small Business Administration. Not having been advised thereof by Small Busi-

ness Administration, this defendant refused to deliver such merchandise to such purchaser, but instead called by telephone the Small Business Administration office in Dallas, Texas, in regard thereto. This defendant was then instructed by the representative of Small Business Administration with whom he talked to deliver all the merchandise to the Houston purchaser, to accept the purchaser's check for ONE THOUSAND DOLLARS (\$1,000.00), to endorse the same and mail it to Small Business Administration. Defendant did as instructed, notwithstanding that the merchandise had a cash market value greatly in excess of ONE THOUSAND DOLLARS (\$1,000.00).

(6) Thereafter, a representative of Small Business Administration held a foreclosure sale at the store in Lampasas and sold thereat the furniture and fixtures, which are listed by plaintiff, for less than 10% of the fair cash market value thereof, notwithstanding that the representative, Charles Motz, had theretofore informed this defendant that he did not intend to sell such property for nothing ; and this defendant had no prior knowledge of nor did he consent to the sale of such property on such occasion for the prices at which the same were sold by Mr. Motz. Defendants' attorney was not present at such sale and in answer to a question by defendant, Mr. Motz implied that defendant did not need his attorney.

(7) The above described property had a fair cash market value of TWELVE THOUSAND DOLLARS (\$12,000.00) or more at the time of sale thereof by Small Business Administration, and this defendant would not have turned the same over to Small Business Administration for liquidation except for the representations made

to him by representatives of Small Business Administration that they had outlets and sources for such property for sale thereof to better advantage than this defendant could have realized by selling such property himself.

(8) All of such property sold by Small Business Administration as aforesaid should, and by the exercise of ordinary care would have been sold for an amount of money sufficient to discharge this defendants' debt to plaintiff, and by reason thereof any recovery by plaintiff against this defendant upon the note sued upon should be offset against the amount of plaintiff's recovery, as damages for the negligent and indifferent sales of the property by plaintiff as aforesaid for wholly inadequate prices.

(9) Names of all of the representatives of Small Business Administration with whom this defendant has been in contact or who have participated in the matters referred to herein, dates of occurrence of events alleged, as well as the names and identity of the various purchases of the property and the amounts paid by them are all matters within the knowledge of plaintiff, and except as stated herein this defendant does not have exact knowledge thereof.

WHEREFORE, having fully answered plaintiff's complaint herein, defendants pray that plaintiff take nothing by its suit against either defendant, and defendant Ethel Mae Yazell specially prays that her defense of coverture be sustained, that she be dismissed from the suit; and in any event that plaintiff take nothing by reason of its suit against her and that no personal judgment be rendered against her; that any recovery by plaintiff

be offset by the damages of defendant; that each and both defendants go hence without day and recover their costs herein.

/s/ J. V. Hammett
P. O. Box 111
Lampasas, Texas
Attorneys for Defendants

CERTIFICATE

I hereby certify that a copy of the foregoing first amended original answer of defendants has been mailed to Ernest Morgan, United States Attorney, San Antonio, Texas, attorney of record for plaintiff, properly addressed to him at P. O. Box 1701, San Antonio 6, Texas, on the 5th day of February, 1963.

/s/ J. V. Hammett
Attorney for Defendants.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
 VS.) CIVIL NO. 1319
DELBERT L. YAZELL, d/b/a)
YAZELL'S LITTLE AGES, and) ORDER
ETHEL MAE YAZELL)

On the 28th day of January 1963 came on to be heard the motion of defendant Ethel Mae Yazell for summary judgment, the motion of plaintiff the United States of America for judgment on the pleadings and for summary judgment and the motion of plaintiff for a more definite statement. Harry Lee Hudspeth, Assistant United States Attorney, for the Western District of Texas appeared for and in behalf of the United States of America and the Honorable J. V. Hammett appeared for and in behalf of defendants Delbert L. Yazell and Ethel Mae Yazell. After considering the pleadings and arguments of counsel, it appears to the Court that the following Order should be entered.

It is, therefore, ORDERED that plaintiff's motion for judgment on the pleadings and for summary judgment in all things be granted as to defendant Delbert L. Yazell, with the exception of that matter relating to the execution of a set-off as alleged in Paragraph IV of defendant's original answer which should be decided only after further pleadings as hereinafter ordered and a hearing on the merits.

It is further ORDERED that judgment on the issue related to the defense of coveture as set out in the motion

for summary judgment by defendant Ethel Mae Yazell is deferred until such time as counsel for plaintiff and defendant can submit briefs to the Court, as provided herein. Defendant shall have ten days from January 28th, 1963 in which to submit a brief in support of his motion for summary judgment. Plaintiff shall have ten days after receipt of defendant's brief to reply thereto. Defendant shall have five days after receipt of plaintiff's reply brief in which to file further brief should he wish to do so.

It is therefore ORDERED that plaintiff's motion for a more definite statement is in all things granted and the defendant, Delbert L. Yazell is ordered to plead within 10 days from January 28th, 1963 in detail all matters for which prayer is made by plaintiff in its motion for a more definite statement.

SIGNED this the 7 day of February, 1963.

/s/ Ben H. Rice, Jr.

Ben H. Rice, Jr.

UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ William O. Murray, Jr.

William O. Murray, Jr.

Assistant United States Attorney

/s/ J. V. Hammett

J. V. Hammett

Attorney for Defendant

Ethel Mae Yazell

ENTERED: Civil 5 Page 405

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)

VS.

CIVIL ACTION

DELBERT L. YAZELL, d/b/a/)

YAZELL'S LITTLE AGES, and) FILE NO. 1319

ETHEL MAE YAZELL)

Defendant)

**MOTION TO STRIKE PARAGRAPH IV OF
DEFENDANT'S FIRST AMENDED ORIGINAL
ANSWER; AND, PLAINTIFF'S RENEWED MOTION
FOR JUDGMENT ON THE PLEADINGS AND
FOR SUMMARY JUDGMENT**

Now comes Plaintiff, United States, and moves the Court to strike all of paragraph IV of Defendant's First Amended Original Answer and renews its Motion for Judgment on the Pleadings and for Summary Judgment. In support of the foregoing Motions, Plaintiff would show the Court:

1. Defendant's First Amended Original Answer, which was filed in response to an order handed down by this Honorable Court, after hearing on Plaintiff's Motion for a more Definite Statement from Defendant, wholly fails to comply with the said order of this Court, and fails to plead in a clear and concise manner the following essential information as specifically requested by Plaintiff and as specifically ordered by the Court:

(1) Defendant wholly fails to inform Plaintiff as to the names of any representatives of this agency, whom he claimed informed him that Plaintiff would handle the sale of his property.

(2) No dates are given on which such alleged agreements or representations are claimed to have been made.

(3) No details of the substance of any such agreements or representations are alleged.

(4) There is absolutely no description of said merchandise, and more particularly such a description as ordered by the Court, i.e., an itemized and detailed description of every piece of personal property which claims Plaintiff agreed to take possession of, or did take possession of, which descriptive list shall be in sufficient detail so that identification of the property can be made therefrom.

(5) Defendant wholly fails to provide any source from which he purchased or obtained this property, the date it was purchased, or the cost price thereof.

(6) No names of any purchasers to whom defendant claims Plaintiff sold any of defendant's property are alleged.

(7) No name of any employee or representative of Plaintiff whom Defendant claims to have been negligent is alleged.

(8) No specific act of negligence on the part of any representative of Plaintiff is alleged, nor, is there set out the time, place, or circumstances of any action claimed to be negligent.

2. The allegations of Defendant in his said First Amended Original Answer to the effect that the names of the representatives of Small Business Administration who participated in the matters referred to therein, the dates of occurrence of alleged events, as well as the names and identities of various purchasers of the property are matters within the knowledge of Plaintiff, and that Defendant does not have exact knowledge thereof, are a sham, and an obvious attempt to wrongfully shift the burden of proof from defendant to Plaintiff concerning a matter in the nature of an affirmative defense. The burden of both allegation and proof of these matters rests squarely on the Defendant. Plaintiff denies knowledge of the occurrences as alleged by Defendant, and, to the contrary alleges, as hereinafter specifically set out, that Defendant's claims are not true. In this connection, Plaintiff incorporates fully by reference herein all of the allegations of its Motion for Judgment On The Pleadings, and For Summary Judgment, heretofore filed herein, and the Affidavit of L. W. Massett attached thereto, and again asserts all allegations contained therein, including, but not limited to, specifically, the following:

(1) Except for the activities of Employee Charles Motz, as related hereinafter, no agent or employee of the Small Business Administration ever been authorized to agree to take possession of any of the property of the Defendant for sale nor has any agent or employee ever taken possession of any of Defendant's property nor made any sale thereof.

(2) All property covered by the mortgage named in paragraph 4 to Plaintiff's Motion for Summary Judgment, excepting only that personal property specifically

enumerated in Exhibit B to Plaintiff's Motion was sold by Defendants with the consent of Small Business Administration. All funds received from such sales were by Cashier's checks made payable jointly to Defendant Delbert L. Yazell and Small Business Administration, and were tendered to Small Business Administration by Delbert L. Yazell after having first been endorsed by him. At no time did any employee or agent of Small Administration ever take possession of any of such merchandise. Delivery of all such merchandise to purchasers were made directly by Mr. Yazell.

(3) The remaining items of furniture, fixtures, and machinery, as itemized in Exhibit B, annexed to Plaintiff's Motion for Summary Judgment which were not sold by Mr. Yazell, were sold by foreclosure sale by Charles Motz, a regular employee of Small Business Administration on the premises of Defendant's in Lampasas, Texas on August 27, 1962, at public auction for cash to the highest bidder. Every detail in connection with the said foreclosure sale was in strict compliance with the instrument of mortgage and in accordance with all laws relating thereto.

(4) All proceeds of the aforesaid sales by Defendants and all proceeds received from the foreclosure sale have been credited to the indebtedness of Defendants prior to filing of the Complaint herein.

3. As further grounds for relief in this case, Plaintiff alleges that because of Defendant's failure to plead

with particularity and to state any cause of action on which an affirmative defense can be predicated, as ordered by this Court, and because all other issues raised by the complaint, with the exception of the defense of coverture asserted by Mrs. Yazell, submitted but not decided, have been resolved in favor of Plaintiff, as evidenced by an order of the Court entered herein, Plaintiff is entitled to Judgment on the pleadings and/or summary judgment against Defendants Delbert L. Yazell and Ethel Mae Yazell; and, by these pleadings do here and now renew its Motion For Judgment On The Pleadings and for Summary Judgment together with the affidavit of L. W. Massett in support thereof, as heretofore filed in this cause, and heretofore served on Defendant, all of which are incorporated herein by reference as fully as though alleged verbatim herein.

WHEREFORE, Plaintiff prays that after hearing herein all allegations of paragraph IV of Defendant's First Amended Original Answer filed herein be stricken; and, that judgment on the pleadings and/or summary judgment be rendered in favor of plaintiff for all relief sought in the compliant filed herein.

/s/ Ernest Morgan
UNITED STATES ATTORNEY
P. O. BOX 1701
SAN ANTONIO, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's motion to strike portions of Defendant's First Amended Original Answer, and Plaintiff's renewed Motion for Judgment on the Pleadings and for Summary Judgment, has been delivered to the Honorable J. V. Hammett, attorney of record for Defendants, Delbert L. Yazell, d/b/a Yazell's Little Ages, and Ethel Mae Yazell, by depositing them in the United States mail at San Antonio, Texas on the 5th day of April, 1963, properly addressed to him at P. O. Box 111, Lampasas, Texas.

/s/ William O. Murray, Jr.

William O. Murray, Jr.

First Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---------------------------|---|--------------|
| UNITED STATES OF AMERICA |) | |
| Plaintiff |) | |
| v. |) | CIVIL ACTION |
| Delbert L. Yazell, d/b/a |) | |
| YAZELL'S LITTLE AGES, and |) | NO. 1319 |
| Ethel Mae Yazell |) | |
| Defendant |) | |

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF DE-
FENDANT ETHEL MAE YAZELL

Came on to be considered the motion for summary judgment filed here in by the defendant, Ethel Mae Yazell, and the Court having considered said motion and the briefs of the parties thereon, is of the opinion that said defendant's plea of coverture herein should be sustained and that judgment should be entered in favor of the said Mae Yazell.

IT IS, THEREFORE ORDERED that Ethel Mae Yazell's motion for summary judgment herein be, and the same is hereby, granted.

It is further ORDERED by the Court that the plea of set-off filed by Delbert L. Yazell be in all things stricken and that the United States is entitled to recover its Judgment against the said Delbert L. Yazell for the

amount sued for; plaintiff's attorneys are requested to submit appropriate Judgment to this Court, that is take nothing against Ethel Mae Yazell, and recover in full on its claim against Delbert L. Yazell, furnishing copy thereof to defendants' attorney.

Done this 6th day of August, 1963.

/s/ Ben H. Rice Jr.
United States District Judge
ENTERED: Civil 5 Page 634

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---------------------------|-----|----------------|
| UNITED STATES OF AMERICA |) | |
| | VS. |) CIVIL ACTION |
| DELBERT L. YAZELL, d/b/a |) | |
| YAZELL's LITTLE AGES, and |) | NO. 1319 |
| ETHEL MAE YAZELL |) | |

ORDER

On the 10th day of June 1963 came on to be heard the motion of Plaintiff, United States of America to strike Paragraph IV of Defendant's First Amended Original Answer; and Plaintiff's renewed motion for judgment on the pleadings and for summary judgment. William O. Murray, Jr., Assistant United States Attorney appeared for and in behalf of the United States, and the Honorable J. V. Hammett, appeared for and in behalf of Defendants Delbert L. Yazell and Ethel Mae Yazell. After considering the pleadings and arguments of counsel relating to the motion to strike Paragraph IV of Defendant's First Amended Original Answer, it appears to the court that the following order should be entered.

IT IS, THEREFORE, ORDERED that Plaintiff's motion to strike paragraph IV of Defendant's First Amended Original Answer is granted and said paragraph IV of defendant's first amended Original Answer shall no longer constitute a part of the pleadings of this cause.

In view of the foregoing order of the court no presentation was made and no action was taken in connection with either Plaintiff's or Defendant's motion for summary Judgment.

ENTERED this 12 day of August, 1963

/s/ Ben H. Rice Jr.
UNITED STATES DISTRICT JUDGE

APPROVED:

/s/ Harry Lee Hudspeth
Assistant United States Attorney

/s/ J. V. Hammett
Attorney for Defendants
Delbert L. Yazell and Ethel Mae
Yazell

ENTERED: CIVIL 5 Page 638

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA)
VS.) CIVIL ACTION
DELBERT L. YAZELL, d/b/a)
YAZELL's LITTLE AGES, and) NO. 1319
ETHEL MAE YAZELL)

SUMMARY JUDGMENT

The Motion for Summary Judgment filed herein by the Plaintiff, United States of America, and the Defendant, Ethel Mae Yazell, having been presented, and the Court being fully advised.

The Court finds that the Plaintiff, United States of America, is entitled to a summary judgment against the Defendant, Delbert L. Yazell, doing business as Yazell's Little Ages, as a matter of law.

The Court finds that the Defendant, Ethel Mae Yazell, based upon her defense of Coverture, is entitled to a summary judgment as a matter of law.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for Summary Judgment against the Defendant, Delbert L. Yazell, doing business as Yazell's Little Ages, be and the same hereby is granted, and the Plaintiff is granted judgment against Defendant, Delbert L. Yazell, for the sum of Four Thousand Seven Hundred Nineteen and 66/100 Dollars (\$4,719.66) with interest at the rate of three per cent per annum from August 27th, 1962 until the date of

entry of this judgment and with interest at the rate of six per cent per annum thereafter until paid.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, Ethel Mae Yazell's Motion for Summary Judgment be, and the same hereby is granted, that the Plaintiff, United States of America, have and recover nothing against defendant, Ethel Mae Yazell, and that the defendant, Ethel Mae Yazell go hence without day.

SIGNED this 15 day of August, 1963.

/s/ Ben H. Rice Jr.

UNITED STATES DISTRICT JUDGE

ENTERED: Civil 5 Page 843

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,)
 APPELLANT)
 v.) No. 21154
ETHEL MAE YAZELL,)
 APPELLEE)

DESIGNATION OF PORTIONS OF RECORD
TO BE PRINTED

Appellant, the United States of America, hereby designates the following portions of the record in the above case to be printed:

Complaint, filed November 16, 1962.

Motion of defendant Ethel Mae Yazell
for summary judgment, filed December 10,
1962.

Defendants' answer, filed December 10,
1962.

Response and affidavit in opposition to
motion for summary judgment, filed
January 17, 1963.

Plaintiff's motion for judgment on
the pleadings and for summary judgment,
filed January 17, 1963.

Motion for a more definite statement,
filed January 17, 1963.

Orders and notices of hearing on motion for
summary judgment, filed, respectively,
January 17, 1963.

Reply of Ethel Mae Yazell to plaintiff's
opposition, filed January 28, 1963.

Defendants' opposition to plaintiff's
motion for judgment and/or summary
judgment, filed January 28, 1963.

Defendants' first amended answer, filed
February 6, 1963.

Order on motion for summary judgment, filed
February 7, 1963.

Motion to strike Par. IV of amended answer,
and for judgment on pleadings and for
summary judgment, filed April 6, 1963.

Order granting motion for summary judgment
of Ethel Mae Yazell, filed August 6, 1963.

Order on plaintiff's motion to strike Par.
IV, filed August 12, 1963.

Summary judgment, filed August 15, 1963.

/s/ Sherman L. Cohn
SHERMAN L. COHN

/s/ J. F. Bishop
J. F. BISHOP

Attorney, Department of Justice,
Washington D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that I have served upon the appellee the foregoing designation of the portions of the record to be printed, by mailing, airmail, postage prepaid, this 2nd day of January, 1964, a copy thereof to the attorney of record for the appellee, J. V. Hammett, Esquire, Box 111, Lampasas.

/s/ J. F. Bishop
J. F. BISHOP

Attorney, Department of Justice
Washington, D. C. 20530

[80] *Minute entry of Argument and Submission—*
May 1, 1964

[Omitted in printing]

[81] In the
 United States Court of Appeals
 for the Fifth Circuit

No. 21154

UNITED STATES OF AMERICA, APPELLANT

versus

DELBERT L. YAZELL, D/B/A YAZELL'S LITTLE AGES,
 AND ETHEL MAE YAZELL, APPELLEES

Appeal From the United States District Court for the
 Western District of Texas

Opinion—July 13, 1964

Before HUTCHESON, PRETTYMAN,* and JONES, Circuit Judges

HUTCHESON, *Circuit Judge*: This appeal is by the United States from a judgment sustaining the appellee's defense of coverture on a note executed under a contract entered into under a federal program authorized by congress for the aiding of small business. The suit was against appellee and her husband, and the judgment against the husband is not appealed from. [82] The sole issue was and is whether the law of Texas, where the contract was made, that a married woman is protected by coverture from personal liability upon a contract, is controlling here, or whether, since the transaction was a transaction with the federal government, the Texas law of coverture is nullified and abrogated.

*Of the District of Columbia Circuit, sitting by designation.

The district judge, sustaining Mrs. Yazell's plea of coverture, followed Texas law as it has been uniformly declared:

"With the adoption of the common law as the rule of decision in this state, in 1840, our married women were rendered unable to bind themselves by contract. Kavanaugh v. Brown, 1 Texas 481. And although by statute we retained the Spanish law rule that the wife can own property, our adoption of the common law meant that she can contract with respect to it or otherwise only for a purpose pointed out by law and only in such manner as our statutes may permit. Graham et al v. Struve et al, 76 Texas 533, 13 SW 381; Speer's Law of Marital Rights (3rd Ed.) Sec. 167, p. 226." [Italics added.] *Tolbert v. Standard Acc. Ins. Co.*, 148 Tex. 235 at p. 238.¹

and the Texas law of coverture is the controlling law. This applies just as well to government groups and the United States as to anybody else. In short, this is not a [83] case like the cases relied on by the United States of federal commercial paper issued by and as an obligation of the United States. This is a simple case of trying to hold a married woman liable on a contract which under the laws of Texas she was incapable of making, and the claim is no more reasonable than to hold that a minor, or one of unsound mind, could be held liable on a contract despite his disability merely because the United States was a party to it. There is nothing in this view, and we are in no doubt that the decision of the district judge should be affirmed.

The contention of the United States, that because the promissory note sued on was payable to The Small Business Administration, the Texas law as above set forth is not controlling here, is completely unfounded, and we reject as without authority here the opinion of the Sixth Circuit, in *U.S. vs. Helz*, 314 F(2) 301, as we reject appellant's contention that the fact that the Small Business Administration is a party to the note sued on nullifies or has any effect on the incapacity of Mrs. Yazell to bind herself by contract.

¹ Cf. 26 Am. Jur., Sec. 207 et seq.; also 30 Tex. Jurisprudence (2nd) Secs. 10 and 11, Sec. 16.

The district judge was right in his decision. His judgment is affirmed.

PRETTYMAN, *Senior Circuit Judge*, dissenting:

Mrs. Yazell and her husband, trading as a partnership, borrowed money from the Federal Government through the Small Business Administration. They signed a note for the loan. They also signed, as security for the loan, a chattel mortgage on the merchandise in [84] their store. They could not pay, and the Government foreclosed on the security. A deficiency remained. The Government sued on the note, praying judgment for the balance of the loan. Mrs. Yazell moved for summary judgment on the ground that she is a married woman and so, in Texas, no personal judgment and no judgment affecting her separate estate can be rendered against her, with a few exceptions not here material. The District Court judge agreed with her, and so do my brethren on this court. I am contrari-minded.

A loan from the Federal Government is a federal matter and should be governed by federal law. There being no federal statute on the subject, the courts must fashion a rule. This is the clear holding of *Clearfield Trust Co. v. United States*.²

To effectuate the policy of the Small Business Act, loans of many hundreds of thousands of dollars each year to businesses must be made throughout the country. These loans can be made only under conditions which will reasonably assure repayment.³ I think the Act should be of uniform application throughout the country. If local rules are to govern federal contracts in respect to the capacity of married women to contract, so too should local rules as to all other features of contractual capacity govern such contracts. Chaos which would nullify federal programs for disaster relief would arise. And of course there is no reason to restrict this decision to loans under the Small Business Act. It would necessarily apply with equal force to [85] every other federal program which involves contracts between the Federal Government and individuals. A multitude of programs will be frustrated by it.

² 318 U.S. 363 (1943).

³ 15 U.S.C. § 636(a) (7) ; 13 C.F.R. § 120.4-2(c) (1958).

It seems to me that, if a person has capacity to get money from the Federal Government, he has the capacity to give it back. The present lawsuit does not involve a general liability for debt; it involves merely the obligation to repay to the Government specific money borrowed from the Government. It seems to me that if a person borrows a horse from a neighbor he ought to be required to give it back if the owner wants it back, whether or not the borrower is a married woman. I suppose the Texas law, by nullifying repayments by married women, tends to minimize ill-advised borrowing. But I think the federal rule ought to be that you must repay what you borrow.

It seems to me that *United States v. Helz*^{*} was correctly decided by the Sixth Circuit and that it applies here. I would follow it.

[86] In the United States Court of Appeals
for the Fifth Circuit

October Term, 1963

No. 21154

D.C. Docket No. 1319—Civil

UNITED STATES OF AMERICA, APPELLANT

versus

DELBERT L. YAZELL, D/B/A YAZELL'S LITTLE AGES, AND
ETHEL MAE YAZELL, APPELLEES

Appeal from the United States District Court for the
Western District of Texas

Before HUTCHESON, PRETTYMAN,* and JONES, Circuit Judges

Judgment—July 13, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

^{*} 314 F. 2d 301 (1963).

^{*}Of the D.C. Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

PRETTYMAN, *Senior Circuit Judge*, dissents.

Issued as Mandate: August 4, 1964.

[87] [Clerk's certificate to foregoing transcript omitted in printing]

[88] Supreme Court of the United States

October Term, 1964

No. 575

UNITED STATES, PETITIONER

vs.

ETHEL MAE YAZELL

Order allowing certiorari—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.